Supreme Court, U.S.
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No.

In the Supreme Court of the United States

Walter L. Sentenn, Jr.
Petitioner;

Vs.

United States of America
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a Federal criminal defendant in an action under 28 U.S.C. § 2255 has made a substantial showing of the denial of a constitutional right so as to entitle him to a certificate of authority under 28 U.S.C. § 2253(c)(2) where he has shown that the court which convicted him of violations of the federal mail fraud statute lacked subject matter jurisdiction according to the decisions of this court and those of a majority of circuits?

2. Whether a Federal criminal defendant in an action under 28 U.S.C. § 2255 has made a substantial showing of the denial of a constitutional right so as to entitle him to a certificate of authority under 28 U.S.C. § 2253(c)(2) where he has shown that his rights under the Sixth Amendment to the effective assistance of counsel was denied as his defense counsel was ineffective because: (1) Counsel failed to raise the lack of jurisdiction argument set out above; (2) Counsel was ineffective for failure to object to and seek a mistrial because of the prosecutor's several acts of misconduct which were, separately and severally, too severe and prejudicial to be corrected; (3) Counsel was ineffective for failing to object to the district court giving the jury the charge known as the "Allen" or dynamite charge, taking its name from Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896); (4) Counsel was ineffective at trial and on appeal for failing to object to the district court imposing restitution on Sentenn without considering Sentenn's ability to pay.

3. Whether under the facts of this case this Court must grant certiorari and issue a 28 U.S.C. § 2253(c)(1) certificate of appealability?

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OPINIONS BELOW

On November 26, 1999, the United States District Court for the Eastern District of Louisiana denied Sentenn's 28 U.S.C. § 2255 petition. (Appendix A) On April 10, 2000, the district court denied Sentenn's motion for a certificate of appealability. (Appendix B) On August 7, 2000, a judge of the United States Court of Appeals For The Fifth Circuit denied a certificate of appealability. (Appendix C)

JURISDICTION

This Court has jurisdiction pursuant to Hohn v. United States, 524 U.S. 236, 118 S.Ct. 1969, 1972, 141 L.Ed.2d 242 (1998)

STATUTES INVOLVED

The statutes involved are 18 U.S.C. §§ 2, 371, and 1341 and 28 U.S.C. §§ 2253 and 2255, which are reproduced in Appendix D.

STATEMENT OF THE CASE

Petitioner, Walter L. Sentenn, Jr., an attorney employed by an insurance company in New Orleans, Louisiana, was convicted on July 7, 1995 of four of fifteen counts on which he had been indicted. Sentenn filed a timely post trial motion under 28 U.S.C. § 2255 collaterally attacking his conviction in the United States District Court For The Eastern District Of Louisiana. That court denied the motion. In the United States Court of Appeals For The Fifth

Circuit Sentenn filed a notice of appeal, a motion for a certificate of appealability pursuant to 28 U.S.C. § 2253, and a supporting brief. The Fifth Circuit denied the motion for a certificate of appealability.

Sentenn was outside counsel for The Risk Exchange, Inc. ("Risk"), a Louisiana surplus lines insurance broker from 1976-1985. Risk wrote property and casualty insurance policies for public entity operations, service companies to the oil and gas industry, and Mardi Gras parade organizations. Risk wrote over $25 million premium dollars through National Union Fire Insurance Company in 1985. National Union served notice on Risk in 1985 that it would no longer write such business through brokers and canceled its contract with RISK. More than $6 million of earned contingency commissions were due Risk from National Union. Risk began collecting these premiums to enable it to fund the creation of a Louisiana property and casualty insurance company to continue such insurance business. This company was to become Pelican State Mutual Insurance Company ("Pelican").

In order to assist Risk in efforts to obtain an insurance company charter from the Louisiana Insurance Department ("Department"), Sentenn became in-house counsel for Risk. In 1986, a charter was granted and Pelican was formed. Pelican operated in 1986-88 through a management agreement with Risk. Sentenn became General Counsel to both Risk and Pelican.

As a result of withdrawal of many insurers from the state of Louisiana, Pelican faced increased demand for

insurance. A downtown New Orleans building acquisition and other surplus increasing efforts had minimal success. Pelican, which had issued $3 million of the $5 million in debentures authorized by the state, requested authority to issue $2 million of debentures remaining. A full disclosure prospectus was prepared, submitted and approved by the Louisiana Department of Insurance. Offerings were made to insurance agents who purchased over $200,000 of such debentures in 1992.

A new insurance commissioner was elected in 1991. His actions resulted in closing over 40 Louisiana property and casualty companies. Pelican was targeted by the Commissioner even though it claimed that it was not impaired. The impairment case against Pelican used a specially appointed judge to hear the case. The evidence of insolvent conditions presented was loss "projections" from an associate actuary. In August of 1992, Pelican and its wholly owned stock company was found impaired and based on the associate actuary's "projections" Pelican was ordered placed into rehabilitation. It should be specifically noted that all claims presented to date against Pelican have been paid or successfully denied. Despite the actuary's projections, no claims against Pelican have been avoided based on inability to pay, including any claims on the appeal bond which formed the basis of Sentenn's conviction under Count Twelve.

Sentenn was indicted on August 17, 1993, on fifteen counts. A superseding indictment in fifteen counts was returned on November 17, 1994. Count One of the superseding indictment charged a conspiracy in violation of 18

U.S.C. §§ 371 and 2. As an essential element the statute requires an alleged conspiracy with an object either to commit a violation of some law(s) of the United States or to defraud the United States or an agency thereof. Count One, therefore, alleges the conspirators conspired to commit mail fraud, 18 U.S.C. § 1341, "in furtherance" of the alleged scheme. Count One lists twenty-one alleged overt acts in furtherance of the conspiracy. None of the alleged overt acts claims any use of the mails. Sentenn was convicted of this count.

Counts Two through Ten allege specific mailings. Sentenn was convicted only of Counts Eight and Ten. Count Eight charges a mailing on March 16, 1992, of an allegedly fraudulent 1991 annual statement of Pelican State Mutual Insurance Company ("Pelican") to the Louisiana Department of Insurance ("Department"). Count Ten charges a mailing on May 14, 1992, of an allegedly fraudulent March 31, 1992, quarterly statement of Pelican to the Department.

Counts Eleven through Fifteen charge additional mailings in violation of § 1341. Sentenn was convicted only of Counts Twelve and Fifteen. Count Twelve charged the mailing of an appeal bond on September 23, 1991, that the Government claimed Pelican did not have the assets to satisfy if a claim had been made that day. Count Fifteen charged a mailing of allegedly fraudulent 1991 annual statements of Pelican and a subsidiary insurance company, Magnolia, to the Louisiana Department of Insurance.

Trial began in June 1995. A juror was excluded by

the district court after deliberations had begun. Deliberations proceeded with an eleven member jury. The jury eventually reported it was deadlocked and announced its division in a note to the Court. The Court responded with a modified Allen "dynamite" charge over objections in chambers by the government. A verdict of guilty on the conspiracy count and on four of the mail fraud counts was immediately returned after the modified Allen charge was given.

Appeal was timely taken to the United States Court of Appeals For The Fifth Circuit. A per curiam opinion was issued by the Fifth Circuit on May 28, 1997, affirming the conviction. (Appendix D) A request to the Fifth Circuit for rehearing en banc was filed on June 11, 1997 and denied on February 17, 1998. A Petition for Writ of Certiorari was filed with the United States Supreme Court on May 19, 1998 and denied on June 22, 1998.

REASONS THE WRIT SHOULD BE GRANTED

I.

SENTENN HAS MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT IN THAT THE COURT WHICH CONVICTED HIM OF VIOLATIONS OF THE FEDERAL MAIL FRAUD LACKED SUBJECT MATTER JURISDICTION ACCORDING TO THE DECISIONS OF THIS COURT AND THOSE OF A MAJORITY OF CIRCUITS

In this proceeding, Sentenn is seeking a certificate of

appealability to the United States Court of Appeals for the Fifth Circuit of the order of the United States District Court for the Eastern District of Louisiana denying Sentenn's 28 U.S.C. § 2255 motion. The 28 U.S.C. § 2255 motion is based on Sentenn's claim that the courts of the United States did not have subject matter jurisdiction under the mail fraud statute and ineffective assistance of counsel in violation of his rights under the Sixth Amendment. The standard to be employed by this Court in deciding whether to grant Petitioner relief is whether Sentenn "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

The Government successfully argued in this case that all it has to allege or prove to obtain criminal jurisdiction under the mail fraud statute, 18 U.S.C. § 1341, is that an individual has done an act which may result in mailing. That is the act is undertaken with the knowledge that the use of the mails will follow in the ordinary course of business, or when such use can reasonably be foreseen, even though not actually intended and even though no mailing occurred.

This position is in conflict with *Schmuck v. United States*, 489 U.S. 705, 714, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989), holding that the scope of the mail fraud statutes is limited by the nature of the alleged fraudulent scheme sought to be furthered by the use of the mails:

> "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." *Kann v. United States*, 323

> U.S. 88, 95, 65 S.Ct. 148, 151, 89 L.Ed. 88 (1944). To be part of the execution of the fraud, however, the use of the mails need not be an essential element of the scheme. *Pereira v. United States,* 347 U.S. 1, 8, 74 S.Ct. 358, 362, 98 L.Ed. 435 (1954). It is sufficient for the mailing to be "incident to an essential part of the scheme," ibid., or "a step in [the] plot,". *Badders v. United States*, 240 U.S. 391, 394, 36 S.Ct. 367, 368, 60 L.Ed. 706 (1916).

There are two types of fraud covered under the mail fraud statutes, traditional fraud, i.e., defrauding of money or tangible property interests (18 U.S.C. § 1341), and fraud involving intangible rights (18 U.S.C. § 1346). *McNally v United States*, 483 U.S. 350, 356, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987) and 1988 Amendments to 18 U.S.C. § 1346. A fraud involving intangible rights requires a pre-existing fiduciary relationship between the defendant and the defrauded entity which was neither present nor even alleged to be present in this case. Claims of violation of intangible rights involve a public official employed by the State or a private employer-employee relationship. *Id.*; *United States v. Brumley,* 116 F.3d 728, 732, 734 (5th Cir. 1997). Therefore, there must be an injury to property rights in this case for the mail fraud statute to apply. *United States v. Salvatore*, 110 F.3d 1131, 1139 (5th Cir. 1997).

The majority of the Circuits reject coverage of the mail fraud statute for prosecuting any fraudulent attempt to obtain state government permits, licenses, permission to operate, or certificates on the ground that such things are not considered "property" of the government entities. *See, e.g., United States v. Schwartz,* 924 F.2d 410, 418 (2nd Cir.

1991); *United States v. Murphy,* 836 F.2d 248, 254 (6th Cir. 1988); *Toulabi v. United States*, 875 F.2d 122, 125 (7th Cir. 1989); *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990); *United States v. Kato*, 878 F.2d 267, 269 (9th Cir. 1989). The decision as to what constitutes "property" is one to be decided by state law. *United States v. Shotts*, 145 F.3d 1289, 1293-94 (11th Cir. 1998).

The alleged fraudulent scheme in Count One and the alleged fraudulent mailings of which Sentenn was convicted, except for Count Twelve, were directed at the Louisiana Department of Insurance to obtain regulatory permission to take certain actions regarding the operations of an insurance company chartered by that Department or to meet conditions necessary to retain that charter. No property interest of the Department or the government of Louisiana was involved.

Salvatore specifically recognized that where the interest of the State in the matter at issue is only regulatory, the property requirement of the mail fraud statute is not satisfied: "We agree, as an initial matter, that the right to regulate a particular industry does not a *fortiori* give the regulator a property interest in licenses signifying the government's regulation." (110 F.3d at 1141) *Salvatore* made an exception to the general rule that government licenses are not property for mail fraud jurisdictional purposes because "video poker licenses are different than other types of licenses." *Id.* at 1142 n. 2. The holding in *Salvatore* makes it absolutely certain that the activities of the Louisiana Insurance Department sought to be influenced by the alleged scheme in Count One did not affect any "money or property" of the Government within the meaning of those terms

necessary to provide jurisdiction under the mail fraud statutes.

In *Neder v. United States*, 527 U.S. 1, 25, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), this Court held an essential element of a mail fraud statute violation is "that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes." It follows as the night the day that if the thing sought to be gained by the alleged fraudulent activity is not covered under the mail fraud statute, the representations made to obtain it cannot be material in terms of the mail fraud statute.

Moreover, the evidence is undisputed that the documents forming the charges could have been, and on occasion had been, hand delivered to the Department. The alleged scheme was in no way dependent on the mailings. In *United States v. Maze,* 414 U.S. 395, 94 S.Ct. 945, 950, 38 L.Ed.2d 603 (1973), the defendant was convicted in the United States District Court for the Western District of Kentucky at Louisville on four counts of mail fraud and one count of knowingly transporting a stolen automobile in interstate commerce. The Court of Appeals reversed the mail fraud conviction, but affirmed the Dyer Act conviction. The Government was granted certiorari. This Court held that defendant's use of a credit card issued by a Louisville, Kentucky bank at motels in California, Florida and Louisiana did not come within the federal mail fraud statute. The Court held that the mail delivery of the credit card sales slips to the Louisville bank were not sufficiently closely related to defendant's scheme to bring his conduct within the statute. The Government claimed that the mailing element

of a violation of 28 U.S.C. § 1341 was supplied by the sellers mailing the invoices to the credit card companies and payment being mailed back to them. The court rejected jurisdiction under the mail fraud statute because it held that the defendant's scheme did not depend on these mailings and they could not supply the requisite mailing element. Similarly, the violations charged in the instant case do not depend on mailing for the success of the alleged fraudulent purpose or scheme.

Two Fifth Circuit cases, *United States v. Vontsteen*, 872 F.2d 626 (5th Cir. 1989) and *United States v. Evans*, 148 F.3d 477 (5th Cir. 1998), support these cases. In *Vontsteen*, the defendant was employed at a company that bought and sold oil field pipe. He caused the company to buy pipe on credit and resell it, but pocketed the profits and did not pay the suppliers. He was charged with mail fraud and the relevant mailings were the invoices sent from the defrauded suppliers to his employer. The conviction was reversed. The court held that it "require[d] that the government *convincingly demonstrate* how such mailings advanced or were integral to the fraud." (emphasis supplied), 872 F.2d at 629.

In *Evans*, the defendant was a parole officer charged with accepting bribes from a person under her supervision to avoid regulations she was supposed to enforce. She was charged with mail fraud. The relevant mailings were the mailing of travel vouchers for trips she had made purporting to visit and regulate the parolee. The court held that this mailing was not in furtherance of the scheme to accept bribes despite the Government claim that the scheme could not have succeeded if the defendant had not submitted the

travel vouchers showing regular visits to the parolee. The court explained the jurisdictional nature of the failure of pleading and proving the required nexus between the alleged mailing and the alleged scheme:

> "The required nexus between the defendant's fraudulent scheme and her use of the mails in furtherance of that scheme – a nexus which must be established in order to prove a crime under 18 U.S.C. § 1341 – is the element that provides a basis *for exercising federal jurisdiction* over the crime of mail fraud. [citing Vontsteen]. The problem with this mail fraud prosecution is not that Evans did not commit criminal acts, but that her criminal acts of *fraud should have been prosecuted under the applicable state law.*" (emphasis supplied) 148 F.3d at 483.

The foregoing establishes there was no federal jurisdiction as to Counts One, Eight, and Fifteen. A violation of the mail fraud statute cannot be validly charged so as to confer jurisdiction unless the underlying fraud is specified in the indictment. *United States v. Fowler*, 891 F.2d 1165, 1166 (5th Cir. 1990) (Court reversed on collateral attack a conspiracy conviction under 18 U.S.C. § 371 based on an alleged agreement to violate the mail fraud statutes because a change in the law subsequent to the conviction established that the alleged scheme could not violate the mail fraud statutes.); *United States v. Yefsky,* 994 F.2d 885, 893 (1st Cir. 1993) ("We think a mail fraud conspiracy depends so crucially on the underlying fraud that the fraud also must be

specified in the applicable count.");[1] *United States v. Roshko*, 969 F.2d 1 (2nd Cir. 1992) (Holding that the alleged objective of a § 371 conspiracy must be stated in the indictment: "In the past, we have admonished prosecutors to be especially careful in drafting indictments under 18 U.S.C. § 371 ...We also noted that because the fraud statutes target a broad range of conduct, it is even more critical that reviewing courts be vigilant to insure that the government does not attempt to broaden the 'already pervasive and widesweeping nets of conspiracy prosecutions."); *United States v. Schramm*, 75 F.3d 156, 163 (3rd Cir. 1996) (While courts must ignore minor and technical deficiencies in an indictment, in cases which involve a conspiracy charge, the illegal object of the conspiracy is an essential element of the offense and must be included in the indictment and the failure to specify the objective of the conspiracy is not a minor or technical deficiency which can be ignored.).

The Government must also allege and prove that the alleged object of the mail fraud statute was unlawful and not merely undesirable in the eyes of the prosecutors. *See, United States v. Baker*, 61 F.3d 317, 325 (5th Cir. 1995) and *United States v. Beuttenmuller*, 29 F.3d 973 (5th Cir. 1994). Thus, if, as the Government claims, the object of the conspiracy was to deceive the Louisiana Insurance Department into issuing and maintaining certificates, licenses, etc, there could be no violation of the mail fraud statutes or of 18 U.S.C. § 371 because no "property" of the Government was affected. The law further establishes that making mailings

[1] The Yefsky court rejected the same argument made in the instant case by the Government, i.e., where the count charges an "agreement" to defraud by use of the mails, "imprecision regarding the mail fraud objective is irrelevant." Id.

required by law, as was the case in the instant reports to the Louisiana Insurance Department, does not violate the mail fraud statutes.

There is no subject matter jurisdiction. If there was a case here, it was a case arising under Louisiana law. The prosecutors, however, tried to make a federal case out of this Louisiana case and therein lies the jurisdictional problem. In the place of specific Louisiana statutes, the Federal prosecutors turned to the mail fraud statute, a federal law neither designed nor applicable to the case. They tried to treat the mail fraud statute as a catchall, so that they could prosecute. It is significant that the Government did not call one person from the Louisiana Department of Insurance as a witness in this case, despite the claim that the Louisiana Department of Insurance was the object of the alleged illegal conduct charged against Sentenn.

The mail fraud statutes should not be used as a vacuum to pull any state case into the Federal system. Chief Justice Rehnquist has warned against the evils produced by this practice. Federal prosecutors may not attempt to make state cases into federal cases through the use of broad and poorly defined federal criminal statutes. See, Address of the Chief Justice on the State of the Judiciary, 1998 American Bar Association Proceedings.

The lack of subject matter jurisdiction can be raised on a 28 U.S.C. § 2255 motion to vacate the sentence. The language of the § 2255 itself makes this clear:

"A prisoner in custody under sentence of a court

established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate. (emphasis supplied)

Therefore, the issue of lack of jurisdiction under the mail fraud statutes is properly before the courts in this proceeding.

The question before this Court is only whether the foregoing constitutes a substantial showing of the denial of a constitutional right. Sentenn is entitled to a certificate of

appealability if it does. Sentenn respectfully submits that he has met the requirement and a certificate should issue.

II.

SENTENN HAS MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT IN THAT HIS RIGHTS UNDER THE SIXTH AMENDMENT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WAS DENIED AS HIS DEFENSE COUNSEL WAS INEFFECTIVE

Under the decision in *Strickland v. Washington*, 466 U.S. 668, 687-689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), in order to establish ineffective assistance of counsel as a violation of one's Sixth Amendment right to counsel, one must satisfy a two prong test: (1) deficient performance; and (2) prejudice. *Strickland*, 466 U.S. at 687.

In *Strickland*, the court held that the method of determination as to the existence of the "prejudice" prong "finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution. *United States v. Agurs*, 427 U.S., at 104, 112-113, 96 S.Ct. 2392, 49 L.Ed.2d 342 ..." 466 U.S. at 694. In *Kyles v. Whitley,* 514 U.S. 419, 115 S. Ct. 1555, 131 L.Ed.2d 490 (1995), this symbiotic relationship between the two doctrines of ineffective assistance of counsel and the failure of the Government to provide exculpatory information was reaffirmed and strengthened. The court in *Kyles* was faced with a situation in which a prisoner condemned to death filed a habeas petition claiming that he had been denied

exculpatory information in the form of conflicting statements the principal witness against him gave the police on different occasions. The court was called on to apply the decision in *United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed. 2d 481 (1985), a paradigmatic case on the issue of the Government supplying the defense with exculpatory information. In construing *Bagley*, the court in *Kyles* adopted the ineffective assistance of counsel "prejudice" standard directly from *Strickland*, referencing the cases that adopted the standards from each of the two theories into the other. 131 L.Ed.2d at 506. The *Kyles* opinion thus refined the ineffective assistance - exculpatory evidence prejudice standard as follows:

> "*Bagley's* touchstone of materiality is a `reasonable probability' of a different result, and the adjective is important. The question is not whether the defendant more likely than not would have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A `reasonable probability' of a different result is accordingly shown when the Government's evidentiary suppression undermines confidence in the outcome of a trial." Id.

The concept of looking at the effect of the absence of suppressed evidence carries directly over into the ineffective assistance "prejudice" test. After Kyles, the focus in ineffective assistance of counsel cases is not on evidence which may support the verdict. Rather the focus is on the effect of the failure of counsel to act appropriately on the actual trial, in terms of undermining confidence in the verdict.

The ineffectiveness of counsel charged by Sentenn is as follows:

(1) Counsel failed to raise the lack of jurisdiction argument set out above.

(2) Counsel was ineffective for failure to object to and seek a mistrial because of the prosecutor's several acts of misconduct which were, separately and severally, too severe and prejudicial to be corrected;

(3) Counsel was ineffective for failing to object to the district court giving the jury the charge known as the "*Allen*" or dynamite charge, taking its name from *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896) ;

(4) Counsel was ineffective at trial and on appeal for failing to object to the district court imposing restitution on Sentenn without considering Sentenn's ability to pay.

The cases and authorities cited above with regard to the lack of subject matter jurisdiction were available to defense counsel at the time of Sentenn's indictment and trial. It was a clear failure of professional duty to fail to raise the jurisdictional issue. The prejudice is obvious. Sentenn has made a substantial showing of the denial of his Sixth Amendment right in this regard.

Second, Sentenn's counsel failed to meet the test of effectiveness imposed by the Sixth Amendment by failing to object to the several acts of prosecutorial misconduct and to

repeatedly insist on a mistrial because of the misconduct. First, the prosecutor argued to the jury that a memorandum, the "Biaette memorandum", was not introduced into evidence as Sentenn's lawyers had said it would be in their opening statement. The prosecutor argued to the jury that the memorandum did not exist. The truth was that Sentenn attempted to introduce the "Biaette memorandum" and the district court sustained the prosecution's objection to it. Yet, knowing he would mislead the jury, the prosecutor made the following argument to the jury and Sentenn's trial counsel made no objection.

> "These guys [defense counsel] stood up in their opening statement-and think back, please, when they're asking why we keep saying did you produce a document. And they told you there was a document out there where everything about that building transaction was disclosed to the Louisiana Insurance Commission. And they mentioned a lady name Elizabeth Biaette, and they went on to tell you that the document was what was hidden from all these people that got on the stand that plead guilty to the same offense that they had done; and that was hidden from them, and because of that they plead guilty and they were innocent people. Well, that document ain't here, and that's why we say, "You tell them about it, you produce it. You get up here and hint about it, you produce it." (R.A., Vol. 26, p. 135, 11. 7-19) (Emphasis added).

The prosecutor deliberately led the jury to believe the document did not exist. The prosecutor did not say the

document had not been introduced into evidence. Instead, intimating that it did not exist, he said it had not been ***produced***. This issue of prosecutorial misconduct was raised on appeal of the case, but could only be reviewed there for "plain error" under Rule 52(b), FRCrP, a highly adverse standard of review, because of the failure of Sentenn's counsel to object. Proper objection by trial counsel would have resulted in corrective action. *United States v. Valentine*, 820 F.2d 565, 570 (2nd Cir. 1987) (reversal is mandated when a prosecutor violates the due process prohibition against a prosecutor using false evidence by misrepresenting the nature of non-testimonial evidence, citing *Miller v. Pate*, 386 U.S. 1, 6-7, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967) and *Napue v. Illinois,* 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)); *United States v. Giovanelli,* 945 F.2d 479, 495 (2nd Cir. 1991) (reversal mandated where prosecutor made an argument to the jury that was based on false statement regarding the evidence when material in prosecutor's own file refuted the truth of prosecutor's argument); *United States v. Carroll,* 26 F.3d 1380, 1389-1390 (6th Cir. 1994) (remarks by prosecutor in closing argument as to truthfulness of Government witnesses and what Government would do to them if they lied were prejudicial and required reversal.).

The Fifth Circuit in *United States v. Collins,* 78 F.3d 1021, 1039 (5th Cir. 1996) established a two-part test for determining whether prosecutorial misconduct warrants a mistrial or reversal:

> "First, we determine whether a prosecutor's conduct and remarks were improper, and then we determine if the impropriety amounts to

> reversible error. [citing *United States v. Carrol,* supra] As to the second part of the test, we consider whether the conduct and remarks tended to mislead the jury or to prejudice the accused; whether they were isolated or extensive; whether they were deliberately or accidentally placed before the jury; and the strength of the evidence before the accused."

The prosecutor's remarks could only mislead the jury. By definition a jury has no way to know about the evidentiary rulings made by the trial judge outside their presence. The jury neither saw nor heard the offer of the document or the government's argument against its admission. The clear implication was that no such document as the "Biaette memorandum" existed. The prosecutor accused Sentenn and his lawyers of trying to mislead the jury about the existence of a document that the prosecutor was now falsely arguing did not exist. If the jury believed the prosecutor, and there was no reason based on their limited knowledge for them not to believe him, then Sentenn was condemned in their eyes as a man who had lied and tried to deceive the jury itself. What could be more damning to a criminal defendant on trial for fraud? Yet, inexplicably, defense counsel made no objection. This is clear ineffective assistance of counsel. Certainly, Sentenn has made a substantial showing of the denial of a constitutional right.

Third, the prosecutor commented during his closing argument on Sentenn's failure to testify by walking over to where Sentenn was sitting and pointing at him while telling the jury that "they" could have called any witnesses "they" wanted to and "they" could have had "their" day in court if

"they" had wanted it. Sentenn's counsel objected to this egregious prosecutorial misconduct, but did not move for a mistrial. The prejudice could not be erased. The damage was done. Only a mistrial could have cured this error. Defense counsel was constitutionally ineffective in failing to move for a mistrial.

Further, in his rebuttal argument the prosecutor said: "Under the law the defense does not have to call a single witness or put on a single shred of evidence, but they have a right to. They can call what witnesses they choose and have their day in court." This was clearly a repetitive comment on Sentenn's failure to testify. Again, Sentenn's counsel failed to move for a mistrial.

Fourth, Sentenn's counsel was ineffective in the Sixth Amendment sense in failing to object to the district court giving the *Allen* charge. This Court has held that the *Allen* charge may not be given where it is coercive in its effect or intimidates the minority of jurors favoring a defendant. *Jenkins v. United States,* 380 U.S. 445, 446, 85 S.Ct. 1059, 13 L.Ed.2d 957 (1965) (percuriam) (appropriate inquiry is whether "in its context and under all the circumstances" giving a modified *Allen* charge is coercive). For examples of coercive *Allen* charges, see, *United States v. Burgos,* 55 F.3d 933, 941 (4th Cir. 1995); *United States v. Robinson,* 953 F.2d 433, 436-438 (8th Cir. 1992); and *United States v. Strothers,* 77 F.3d 1389,1391 (D.C.Cir.), cert. denied, 117 S.Ct. 374 (1996). In each of these cases, the key to the ruling was pressure on the minority favoring the defendant. The situation in the instant case was that the jury could not reach a verdict until the *Allen* charge was

given. Sentenn has made a substantial showing that his counsel was ineffective in filing to object on the ground that the charge would be coercive under the circumstances of the instant case.

Fifth, the court should not, under applicable law, have imposed restitution on Sentenn because he had no funds with which to pay the restitution. Sentenn's Presentence Investigation Report shows he has no meaningful assets. His license to practice law was lost. He had no ability to earn an income adequate to care for his family and himself. There was no way he could ever pay restitution in the amount of $100,000.00. The restitution in this case was imposed prior to the law on "mandatory" restitution.

There was no consideration of the ability of Sentenn to pay restitution. Under the pre-mandatory version of the Victim and Witness Protection Act, 18 U.S.C. § § 3663-3664, the sentencing court was specifically directed to consider not only the victim's loss, but the defendant's ability to pay the restitution. Specifically, the pre-mandatory version of 18 U.S.C. § 3664(a) provided that the sentencing court must consider "... the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents..." (Supp. 1993). Sentenn's counsel should have been aware that it was his duty to present evidence that Sentenn could not pay the restitution imposed and have offered the ample evidence available. Sentenn's counsel failed to make the arguments, objections, and present the evidence necessary to call to the attention of the district court that it was imposing restitution in violation of the law. This failure constituted ineffective assistance of counsel.

As to the prejudice inquiry, certainly restitution in the amount of $100,000.00 would not have been imposed had the Petitioner's counsel offered available evidence of financial inability to pay. Accordingly, Sentenn has made a substantial showing of ineffective assistance of counsel.

CONCLUSION

Sentenn is only required to show a substantial question of the denial of a constitutional right in order to be entitled to a certificate of appealability under 28 U.S.C. § 2253. As shown above, he has more than met that standard. This Court should order the issuance of the certificate of appealability.

Respectfully submitted this _____ day of November, 2000.

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APPENDIX

18 U.S.C § 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C § 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C § 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful

use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both

18 U.S.C § 3663. Order of restitution

- (a)
  - (1)
    - (A) The court, when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or section 46312, 46502, or 46504 of title 49, other than an offense described in section 3663A (c), may order, in addition to or, in the case of a misdemeanor, in lieu of any

other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

• (B)

• (i) The court, in determining whether to order restitution under this section, shall consider -

• (I) the amount of the loss sustained by each victim as a result of the offense; and

• (II) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

• (ii) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

• (2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conpiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct n the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal

guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such repre sentative or guardian.

- (3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

- (b) The order may require that such defendant -
  - (1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense -
    - (A) return the property to the owner of the prop erty or someone designated by the owner; or
    - (B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of -
      - (i) the value of the property on the date of the damage, loss, or destruction, or
      - (ii) the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the prop erty that is returned;
  - (2) in the case of an offense resulting in bodily injury to a victim including an offense under chapter 109A or chapter 110 -
    - (A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method

of healing recognized by the law of the place of treatment;

- (B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and
- (C) reimburse the victim for income lost by such victim as a result of such offense;

- (3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services;
- (4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense; and

(5) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitu tion to a person or organization designated by the victim or the estate.

- (c)
  - (1) Notwithstanding any other provision of law (but subject to the provisions of subsections (a)(1)(B)(i)(II) and (ii), (FOOTNOTE 1) when sentencing a defendant convicted of an offense described in section 401, 408 (a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863), in which there is no identifiable victim, the court may order that the defendant make restitution in accordance with this subsection.

- (2)
  - (A) An order of restitution under this subsection shall be based on the amount of public harm caused by the offense, as determined by the court in accordance with guidelines promulgated by the United States Sentencing Commission.
  - (B) In no case shall the amount of restitution ordered under this subsection exceed the amount of the fine ordered for the offense charged in the case.
- (3) Restitution under this subsection shall be distributed as follows:
  - (A) 65 percent of the total amount of restitution shall be paid to the State entity designated to administer crime victim assistance in the State in which the crime occurred.
  - (B) 35 percent of the total amount of restitution shall be paid to the State entity designated to receive Federal substance abuse block grant funds.
- (4) The court shall not make an award under this subsection if it appears likely that such award would interfere with a forfeiture under chapter 46 or chapter 96 of this title or under the Controlled Substances Act (21 U.S.C. 801 et seq.).
- (5) Notwithstanding section 3612 (c) or any other provision of law, a penalty assessment under section 3013 or a fine under subchapter C of chapter 227 shall take precedence over an order of restitution under this subsection.
- (6) Requests for community restitution under this subsection may be considered in all plea

agreements negotiated by the United States.

- (7)
  - (A) The United States Sentencing Commission shall promulgate guidelines to assist courts in determining the amount of restitution that may be ordered under this subsection.
  - (B) No restitution shall be ordered under this subsection until such time as the Sentencing Commission promulgates guidelines pursuant to this paragraph.
- (d) An order of restitution made pursuant to this section shall be issued and enforced in accordance with section 3664.

18 U.S.C § 3664. Procedure for issuance and enforcement of order of restitution

- (a) For orders of restitution under this title, the court shall order the probation officer to obtain and include in its presentence report, or in a separate report, as the court may direct, information sufficient for the court to exercise its discretion in fashioning a restitution order. The report shall include, to the extent practicable, a complete accounting of the losses to each victim, any restitution owed pursuant to a plea agreement, and information relating to the economic circumstances of each defendant. If the number or identity of victims cannot be reasonably ascertained, or other circumstances exist that make this requirement clearly impracticable, the probation officer shall so inform the court.
- (b) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters

described in subsection (a) of this section.

- (c) The provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules of Criminal Procedure shall be the only rules applicable to proceedings under this section.
- (d)
  - (1) Upon the request of the probation officer, but not later than 60 days prior to the date initially set for sentencing, the attorney for the Government, after consulting, to the extent practicable, with all identified victims, shall promptly provide the probation officer with a listing of the amounts subject to restitution.
  - (2) The probation officer shall, prior to submitting the presentence report under subsection (a), to the extent practicable -
    - (A) provide notice to all identified victims of -
      - (i) the offense or offenses of which the defendant was convicted;
      - (ii) the amounts subject to restitution submitted to the probation officer;
      - (iii) the opportunity of the victim to submit information to the probation officer concerning the amount of the victim's losses;
      - (iv) the scheduled date, time, and place of the sentencing hearing;
      - (v) the availability of a lien in favor of the victim pursuant to subsection (m)(1)(B); and
        (vi) the opportunity of the victim to file with the probation officer a separate affidavit relating to the amount of the victim's losses subject to restitution; and
        (B) provide the victim with an affidavit form to

submit pursuant to subparagraph (A)(vi).

- (3) Each defendant shall prepare and file with the probation officer an affidavit fully describing the financial resources of the defendant, including a complete listing of all assets owned or controlled by the defendant as of the date on which the defendant was arrested, the financial needs and earning ability of the defendant and the defendant's dependents, and such other information that the court requires relating to such other factors as the court deems appropriate.
- (4) After reviewing the report of the probation officer, the court may require additional documentation or hear testimony. The privacy of any records filed, or testimony heard, pursuant to this section shall be maintained to the greatest extent possible, and such records may be filed or testimony heard in camera.
- (5) If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing. If the victim subsequently discovers further losses, the victim shall have 60 days after discovery of those losses in which to petition the court for an amended restitution order. Such order may be granted only upon a showing of good cause for the failure to include such losses in the initial claim for restitutionary relief.
- (6) The court may refer any issue arising in connection with a proposed order of restitution to a magistrate judge or special master for proposed findings of fact and recommendations as to disposition, subject

to a de novo determination of the issue by the court.

- (e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defen dant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.
- (f)
  - (1)
    - (A) In each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant.
    - (B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.
  - (2) Upon determination of the amount of restitution owed to each victim, the court shall, pursuant to section 3572, specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid, in consideration of -
    - (A) the financial resources and other assets of the defendant, including whether any of these assets are jointly controlled;

- (B) projected earnings and other income of the defendant; and

  (C) any financial obligations of the defendant; including obligations to dependents.
- (3)
  - (A) A restitution order may direct the defendant to make a single, lump-sum payment, partial payments at specified intervals, in-kind payments, or a combination of payments at specified intervals and in-kind payments.
  - (B) A restitution order may direct the defendant to make nominal periodic payments if the court finds from facts on the record that the economic circumstances of the defendant do not allow the payment of any amount of a restitution order, and do not allow for the payment of the full amount of a restitution order in the foreseeable future under any reasonable schedule of payments.
- (4) An in-kind payment described in paragraph (3) may be in the form of -
  - (A) return of property;
  - (B) replacement of property; or
  - (C) if the victim agrees, services rendered to the victim or a person or organization other than the victim.
- (g)
  - (1) No victim shall be required to participate in any phase of a restitution order.
  - (2) A victim may at any time assign the victim's interest in restitution payments to the Crime Victims Fund in the Treasury without in any way impairing the obligation of the defendant to make such payments.

- (h) If the court finds that more than 1 defendant has contributed to the loss of a victim, the court may make each defendant liable for payment of the full amount of restitution or may apportion liability among the defendants to reflect the level of contribution to the victim's loss and economic circumstances of each defendant.
- (i) If the court finds that more than 1 victim has sustained a loss requiring restitution by a defendant, the court may provide for a different payment schedule for each victim based on the type and amount of each victim's loss and accounting for the economic circumstances of each victim. In any case in which the United States is a victim, the court shall ensure that all other victims receive full restitution before the United States receives any restitution.
- (j)
  - (1) If a victim has received compensation from insurance or any other source with respect to a loss, the court shall order that restitution be paid to the person who provided or is obligated to provide the compensation, but the restitution order shall provide that all restitution of victims required by the order be paid to the victims before any restitution is paid to such a provider of compensation.
  - (2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in -
    - (A) any Federal civil proceeding; and
      (B) any State civil proceeding, to the extent provided by the law of the State.
- (k) A restitution order shall provide that the defendant

shall notify the court and the Attorney General of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution. The court may also accept notification of a material change in the defendant's economic circumstances from the United States or from the victim. The Attorney General shall certify to the court that the victim or victims owed restitution by the defendant have been notified of the change in circumstances. Upon receipt of the notification, the court may, on its own motion, or the motion of any party, including the victim, adjust the payment schedule, or require immediate payment in full, as the interests of justice require.

- (l) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.
- (m)
  - (1)
    - (A)
      - (i) An order of restitution may be enforced by the United States in the manner provided for in subchapter C of chapter 227 and subchapter B of chapter 229 of this title; or
      - (ii) by all other available and reasonable means.
    - (B) At the request of a victim named in a restitution order, the clerk of the court shall issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering

recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments of the court of the State where the district court is located, the abstract of judgment shall be a lien on the property of the defendant located in such State in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that State.

- (2) An order of in-kind restitution in the form of services shall be enforced by the probation officer.

- (n) If a person obligated to provide restitution, or pay a fine, receives substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.
- (o) A sentence that imposes an order of restitution is a final judgment notwithstanding the fact that -
  - (1) such a sentence can subsequently be -
    - (A) corrected under Rule 35 of the Federal Rules of Criminal Procedure and section 3742 of chapter 235 of this title;
    - (B) appealed and modified under section 3742;
    - (C) amended under section 3664 (d)(3); or
    - (D) adjusted under section 3664 (k), 3572, or 3613A; or
  - (2) the defendant may be resentenced under section 3565 or 3614.
- (p) Nothing in this section or sections 2248, 2259, 2264, 2327, 3663, and 3663A and arising out of the application of such sections, shall be construed to create a cause of action not otherwise authorized in favor of any

person against the United States or any officer or employee of the United States.

28 U.S.C. § 2253. Appeal

- (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.
- (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.
- (c)
  - (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from -
    - (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
    - (B) the final order in a proceeding under section 2255.
  - (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
  - (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a

prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of -

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18. A second or successive motion must be certified as

provided in section 2244 by a panel of the appropriate court of appeals to contain -

- (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
- (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
Date of Entry NOV 24, 1999

UNITED STATES OF AMERICA CRIMINAL ACTION

VERSUS NO. 93-332
(CIVIL ACTION NOS. 99-785 & 99-1247)

MICHAEL J. BOWLER & WALTER L. SENTENN SECTION "C"

ORDER AND REASONS

Before the Court are Motion for New Trial filed by defendant Michael Bowler ("Bowler"), Motion to Vacate Sentence under 28 U.S.C. § 2255 filed by defendant Bowler and Motion to Vacate Sentence under 28 U.S.C. § 2255 filed by defendant Walter Sentenn ("Sentenn"). The government has filed objections based on procedural bars as well as the lack of substantive merit. The Court acknowledges that since the original convictions in this matter, defendant Bowler has filed a motion for judgment of acquittal and now three motions for new trial; defendant Sentenn has likewise filed a motion for judgment of acquittal and now five motions for new trial. All the prior motions were denied as were the defendants' appeals. Nevertheless, in the hope of finally putting all issues to rest, the Court will decline to pass on the various procedural bars raised, but instead review the complaints on the merits. For the reasons stated below, these motions are DENIED.

1. Defendant Bowler's Motion for New Trial

Defendant Bowler filed a motion for new trial under Rule 33 of the Federal Rules of Criminal Procedure, claiming that newly discovered evidence warrants a new trial. The newly discovered evidence is alleged to be that Pelican State Mutual Insurance Company ("Pelican") was not in fact insolvent when it was closed by the State of Louisiana. Therefore, the defendants could not have defrauded anyone by creating an "Illusion" of solvency, as charged in the indictment.

The factual crux of Mr. Bowler's argument is that the projected number of Pelican policy claims, as testified to by government witness Michael Scruggs and from which he assessed Pelican's financial stability in 1992, turned out to be ultimately incorrect. According to Mr. Bowler, in the years subsequent to the trial, far fewer claims were made against Pelican than anticipated. Therefore, in hindsight, Pelican was not "insolvent" at the time it was closed down. In addition, Mr. Bowler argues that Mr. Scruggs' methodology was defective, as borne out by the newly discovered evidence.

The elements of a newly discovered evidence claim are that: (a) the evidence be newly discovered and unknown at time of trial; (b) the failure to detect the evidence was not due to lack of diligence; (c) the evidence is material, not merely cumulative or impeaching; and (d) evidence will probably produce an acquittal. United States v. Pena, 949 F.2d 751, 758 (5th Cir. 1991).

The Court finds that the proposed new evidence is simply irrelevant. The jury was made well aware that in the unique world of the insurance industry, a company's financial health, including its "solvency," cannot be assessed simply by comparing its assets to its debts at any finite point in time. Since insurance deals with unknown future debts in the form of claims, the financial stability of a company is assessed through statistical projections as to what claims are likely to come in the future as compared to the loss reserves maintained in house. Assistant United States Attorney Marvin Opotowsky, in his opening statement, acknowledged that an insurance company has to make its "best estimate" but that the law requires that certain thresholds not be breached, i.e. having less than $1 million in surplus. (Trans. Vol. II, 17-19). He spoke of the role of actuaries and how they use statistics to determine the incurred losses that have not yet been reported. He admitted "Yes, it is a guess, but it is an educated, reliable guess." (Trans. Vol. II, p. 24). Likewise, Mr. Bowler's attorney in opening told the jury that "actuarial data is not an exact mathematical science. What an actuary does is to look at your company or look at what you are going to do when you form your company and say, 'If you do this and your claims are this, then, at some date in the future you will still be able to pay your claims.'" (Trans. Vol. II, p. 47; also p. 50). Mr. Bowler's attorney also elicited evidence that actuarial work is not a hard science; that it is based on statistical "probability"; that it is impossible know what will actually happen in the future; that actuaries make assumptions. (Trans. Vol. IV, pp. 163-166). Michael Scruggs, the witness whose testimony is being disputed by Mr. Bowler, described actuaries as providing a "financial forecast" - "an actuary will help price the insurance

products, like, since you're selling a product before you know what the cost of those goods are, you collect the premium up front from the insured and you hope that the aggregate experience of losses from the people that you insured, less expenses, don't exceed the premium collected." (Trans. Vol. 12, p. 1613). He also explained in detail how an actuary makes his evaluations, an explanation that it made it quite clear that the results were projections into the future, not absolute fact. (Trans. Vol. 12, pp. 1615-1619). As Mr. Bowler himself notes, the Scruggs report, contains the disclaimer that the "true value of liability for losses or loss adjustment expenses at any accounting date can be known only when all attendant claims have been settled." (Gov. Exh. 261). In closing, counsel emphasized again the speculative nature of the actuarial assessments, and the amorphous meaning of "insolvency." (Trans.Vol.15, pp. 2146-2147, pp. 2148-2149).

Similarly, Mr. Bowler's counsel effectively challenged Mr. Scruggs' knowledge, and attacked his qualifications and credibility in closing argument. (Trans. Vol. 12, pp. 1633-1635; Vol. 15, pp. 2174-2175). Counsel emphasized that a new company like Pelican did not have the benefit of its own historic loss experience from which to make projections. (Trans. Vol. IV, pp. 158-159; Vol. 15, pp. 2150-2151). Counsel elicited from government witness Constance Korte that it takes some time for a new company such as Pelican to build up a loss experience from which to establish reserves. (Trans. Vol. 13, p. 1698). Mr. Bowler himself explained to the jury how a company needs to be in existence at least five years before any accurate assessment can be made of how its losses are running vis-a-vis reserves

which is why he was skeptical of the actuarial opinions; he also explained Pelican's own various growing pains in the business and why he felt the company was doing better than the actuarial opinions reflected. (Trans. Vol. 13, p. 1857-1867; 1871-1873).

Furthermore, it was not simply Michael Scruggs whose calculations found Pelican to be "insolvent" based on their projections. As one former Pelican officer testified, "all (of the actuarial studies) came up, with answers that did me damage." (Trans. Vol. IV, p. 166). Lawrence Pratt, who was an officer and treasurer of Pelican, did calculations as early as 1988 which indicated their surplus was below the threshold. (Trans. Vol. III, p. 88). Throughout his tenure, virtually every calculation he made showed Pelican operating below the required minimums. (Trans. Vol. IV, pp. 14-15). Others in Pelican's financial office came to similar conclusions. (Trans. Vol.7, p. 616). In 1989, Pelican retained an outside actuary, Wayne Holdredge, to do a formal evaluation of Pelican's loss reserves for 1988, and he similarly concluded their loss reserves were insufficient. (Trans. Vol. III, p. 146; Vol. 8, p. 753). In 1991, another actuarial firm, Mercer & Company, was retained to do another independent actuarial study and in essence concluded Pelican was insolvent. (Trans. Vol. IV, pp. 102-103, p. 107; Vol. 8,pp.763-766). Rather than rely on that opinion, Mr. Bowler retained another actuary, Mihn Trihn. His evaluation was more favorable than that of Mercer & Company but he likewise found Pelican to be insolvent. (Trans. Vol, IV, pp. 121-122).

In short, it was made clear to the jury that Pelican's actual solvency could not be determined. Rather "solvency"

was assessed statistically, based on actuarial projections into the future which were in turn based on insurance industry experience. Mr. Bowler himself and his counsel attacked those projections. The jury was free to accept or reject them. The jury accepted them as was within their prerogative to do. The fortuitous fact that fewer claims than were projected were ultimately made does not change the reality that by the time Pelican was seized, the virtually unanimous projections made by the various actuaries and accountants in this case indicated it was "insolvent" and had been for some time.

11. Defendant Bowler's Motion under 28 U.S.C. 2255 to Vacate Sentence

Ground One, Two & Three: Attorney's Conflict of Interest and Ineffectiveness of Counsel

Defendant Bowler claims his Sixth Amendment right to counsel was denied because his attorney had a conflict of interest. Specifically, prior to, during and after Mr. Bowler's trial, his counsel allegedly owed over $900,000 on a defaulted obligation which was then being held by the Insurance Commissioner's Office, having originally been owed to financial institutions that had been seized. Mr. Bowler alleges that his counsel's negotiations to reduce his obligation caused him to be less than zealous in preparing and presenting his defense. Mr. Bowler recites a long list of alleged deficiencies in his counsel's representation all of which center around the alleged failure of counsel to attack Insurance Commissioner James Brown and his office.

Mr. Bowler apparently believes that his downfall

came about through no fault of his own but because the Insurance Commissioner was out to get him, for his own corrupt cronyism purposes. Mr. Bowler states that he "instructed" his counsel as to his defense and that he "wanted to prove that Pelican was closed, as were other insurance companies, in order to further the political career of Brown, help his friends pick through the assets of those companies, and as a favor to the competitors of the companies." (Bowler's Motion, pp. 13-14). Had his counsel presented such a defense, this Court surmises that Mr., Bowler would be serving a significantly longer sentence now, having been mostly likely convicted of all charges. While Mr. Bowler's paranoia regarding Commissioner Brown may be of some solace to him now to excuse his own behavior, to propose such a defense is foolhardy, even in hindsight.[1] The Court has reread the entire trial transcript, all of which is about what happened inside Pelican, mostly in the years prior to Commissioner Brown even taking office. The crushing testimony came from Pelican's own former officers and employees, as well as others who had direct dealings with Pelican. Commissioner Brown was not the enemy. As the literary expression goes, the enemy was us - Pelican's policies, as orchestrated by the defendants, were the cause of its own demise. The Insurance Commissioner's office was a peripheral player in Mr. Bowler's trial, an entity that stepped in to stop the bleeding and shut Pelican down, but the wounds had

[1] Worth noting is that counsel did in fact criticize the Louisiana Insurance Department, including Commissioner Brown's tenure. In opening, counsel stated "you are going to see what fools and jackasses administer this system in Louisiana. What's good government one day ain't good government the next, just the opposite can be good government, because 'we are just going to go outthere and do whatever we have got to do to look good.'" (Trans. Vol. II,p. 52). He likewise told the jury that the closure of Pelican by Brown's office was a denial of due process. (Trans. Vol. II, pp. 52-53). Wisely, however, as stated above, this anti-Brown theory was not the thrust of his defense.

been inflicted long before from within. Defense counsel's alleged conflict had no bearing, even were there such a conflict, since the Insurance Commissioner was neither Mr. Bowler's accuser in this case nor was he the cause of Mr. Bowler's difficulties. In his most recent filing, Mr. Bowler argues that Commissioner Brown's recent indictment supports his motion for new trial. Apart from the fact that Mr. Brown is entitled to the presumption of innocence, whatever dealings he may have had with an unrelated insurance company does not change what occurred within Pelican between 1986 and 1992.

Mr. Bowler lists a lengthy series of his counsel's alleged failures at trial and attributes them to his counsel's alleged desire to appease the Insurance Commissioner and the Attorney General's Office. Again, the Court has re-read the entire transcript and finds that counsel's representation was thorough, spirited and more than competent. Counsel was obviously well-versed in the underlying facts as evidenced by his thorough examination of witnesses. He was able to translate the complex intricacies of insurance into language understandable by a lay jury. The Court notes also that counsel has an engaging personality before the jury, which could only have helped soften some of the hard edges of the govemment's evidence showing the defendants' self-interest in amassing financial advantages for themselves at the expense of Pelican's policyholders and claimants. The fact that both defendants were acquitted of ten of fifteen counts says volumes regarding the defense, considering the weight of the evidence against the defendants as to all counts. Mr. Bowler's various complaints regarding his counsel's representation are simply not borne out by the record. Defense counsel was well-prepared, was effective in his

examination of witness and arguments, and was obviously effective with the jury.

Ground Four: Adoption of co-defendant Walter Sentenn's Motion

Defendant Bowler adopts co-defendant Walter Sentenn's Motion under 28 U.S.C. 2255. That motion is dealt with below.

Ground Five: Denial of Right to Trial by Jury

After the jury retired to deliberate, juror Latanya. Fair was dismissed and deliberations continued with the remaining eleven jurors. The record reflects that counsel for both of the defendants acquiesced in this procedure. In fact, as will be noted shortly, it was Mr. Bowler's attorney who aggressively sought the dismissal of the juror and provided the back-up information making it justifiable. Mr. Bowler, however, contends he did not consent to proceeding with an eleven person jury, as allegedly required by Fed. R. Crim. P. 23(b). He claims he was not consulted on the matter.

Mr. Bowler is correct in that the Court did not obtain a written stipulation from him, nor does the record reflect that be personally agreed to the procedure. While the Court is extremely skeptical of the petitioner's claim at this late date that he was not in fact in agreement, the Court was remiss is not securing that consent on the record at the time. Nevertheless, it was not in fact necessary to do so.

Petitioner Bowler readily concedes even now that he wanted Ms. Fair dismissed, and had wanted her dismissed from early on in the trial because he perceived her to be

hostile to his cause.[2] Prior to closing argument, information came to light which indicated Ms. Fair had had more encounters with the criminal justice system than she disclosed on voir dire and she was questioned further by the Court on those matters. (Trans. Vol. 15, pp. 2092-2099; see also pp. 2139-2140, p, 2177). After closing argument, the defense urged that Ms. Fair be excused, which the Court declined to do. (Trans. Vol 15, pp. 2252-2254). During jury deliberations, after Ms. Fair wrote a note to the Court regarding two of the counts, counsel for Mr. Sentenn reargued that she be dismissed. (Trans. Vol. 16, pp. 2268-2269). Later during deliberations, the deputy clerk reported to the Court and counsel an incident indicating that Ms. Fair was upset in the jury room, wanting off the jury and that another juror was upset. (Trans. Vol. 16, pp. 2271-2272). A discussion then ensued about the consequences of dismissing this juror - whether it would be a mistrial, bringing in an alternate juror or proceeding with eleven. At that time also, Mr. Bowler's attorney indicated he had some information regarding the accuracy of the juror's statements during voir dire and in the subsequent meeting with the Court; at the close of court that day, without the juror being excused, the Court advised counsel to follow up on his information and report back on what he had learned. (Trans. Vol. 16, pp. 2272-2274).

The following day, Mr. Bowler's attorney presented documents which showed that the juror had lied to the Court during the voir dire and also in the Court's earlier discussion

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[2] Counsel for Mr. Sentenn early in the trial complained that Ms. Fair was inattentive. (Trans. Vol. 7, pp. 549-550).

with her regarding her criminal history. The Court stated "(f)or the record" that the juror had made misrepresentations with respect to her criminal past and the Court then excused the juror. (Trans. Vol. 17, pp. 2277-2278). The attorneys then concurred to go forward with eleven jurors. While such a stipulation is one means to proceed, it was not in fact required.

Rule 23(b) provides two means by which an eleven member jury can preside over a criminal case - if the parties stipulate in writing with the approval of the court to so proceed or if the court finds it necessary to excuse a juror "for any just cause", even without a stipulation. In this case, the juror was excused for "just cause" so a stipulation was not necessary.

Mr. Bowler dismisses this rationale on the basis that the court "did not excuse Ms. Fair for 'just cause' but dismissed her because she not only lied during voir dire but she was inattentive and disruptive as well." The court does not understand the distinction - clearly, the juror was excused/dismissed for "just cause" - a dismissal with which Petitioner Bowler concurred. The juror's misrepresentations were significant in that they showed lack of candor on her part in general and also withheld information from the attorneys that was important for their challenges - certainly in a criminal case, the criminal history of a prospective juror is significant. Once deliberations begin, if a juror is dismissed, the court has two alternatives only -declare a mistrial or proceed with eleven jurors. That decision is within the court's discretion but the option of proceeding with eleven is preferred, particularly in lengthy and protracted trials, as this

one was, See United States v. Huntress, 956 F.2d 1309, 1315 (5th Cir. 1992), denied, 508 U.S. 905 (1993); United States v. Webster, 162 F.3d 308, 346 (5th Cir. 1998), cert. denied, __U.S.__, 120 S.Ct. 83 (1999).

Mr. Bowler does not challenge, indeed he supports, the dismissal of juror Fair. Nor does he claim that proceeding with eleven jurors, rather that declared a mistrial, was an abuse of the court's discretion. He only argues that he wasn't consialted regarding the stipulation to proceed with eleven jurors. But once a juror is dismissed for just cause "Rule 23(b) explicitly and without reservation assigned the stop/go decision to the discretion of the trial court", United States v. Harrington, 108 F.3d 1460, 1472 (D.C.Cir. 1997), regardless of the wishes of the parties. While the attorneys did consent to so proceed, obtaining that consent or the consent of the parties was not necessary.

III. Defendant Sentenn Motion under 28 U.S.C. 2255 to Vacate Sentence

Ground One: Lack of Jurisdiction as to Count One

Defendant Sentenn contends that the Court lacked jurisdiction as to Count One because the mail fraud conspiracy failed to alleged in its overt acts any mailing or use of the mails. Mr. Sentenn's argument is based in part on the fact that both he and Mr. Bowler were acquitted of substantive

offenses occurring prior to a certain date[3] and therefore any overt acts alleged in the conspiracy occurring prior to that date were not in violation of law. Defendant Sentenn overlooks the distinction between the elements of conspiracy - which only requires an agreement to commit an offense, plus one overt act, which may or may not be criminal in itself, and a substantive offense which requires proof of a completed act. Nevertheless, for purposes of this evaluation, the Court will assume Mr. Sentenn is correct and that only overt acts occurring after the date of their first substantive conviction should be considered.

To prove conspiracy to commit mail fraud, the government must prove: (1) an agreement between the defendants and others; (2) to commit the crime of mail fraud; and (3) an overt act in furtherance of that agreement. United States v. Massey, 827 F.2d 995 (5th Cir. 1987). It is not necessary that any particular overt act be proved, including actual use of the mails. Id., 827 F.2d at 1001. Nevertheless, to be guilty of conspiracy, the defendants must have had the requisite intent to commit mail fraud. Mail fraud, however, has no specific intent requirement with regard to the mailing. The test is whether use of the mails was reasonably foreseeable. A defendant need not intend to cause the mails to be used; what is required is that he contemplated that the mails would likely be used. Id, 827 F.2d at 1001 -1002; see also

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[3] Mr. Senterin's date is March 16, 1992, the date that Pelican's 1991 Annual Statement was submitted. However, both defendants were convicted of a mail fraud offense on September 23, 1991, for the mailing of an appeal bond.

United States v. Sneed, 63 F.3d 381 (5th Cir. 1995), cert. denied, 516 U.S. 1048 (1996). A defendant causes the mails to be used when he has the knowledge that the use of the mails will follow in the ordinary course of business. United States v. Shaid. 730 F.2d 225 (5th Cir.), cert. denied, 469 U.S. 844 (1984).

As already noted, it is not necessary in a conspiracy to commit mail fraud for the indictment to allege actual mailings among the overt acts, VAat is necessary is to allege that the defendants conspired to use and cause the mails to be used in furtherance of their scheme. This is properly alleged in the indictment.

Furthermore, even considering only those overt acts occurring after September 23, 1991, the indictment alleges incidents in which use of the mails was reasonably foreseeable. Overt act #19 refers to worthless appeal bonds which were executed by the defendants to prevent claimants from collecting on large judgments. Overt act #21 refers to a fraudulent pooling arrangement created to hide Pelican's losses on its quarterly and annual financial statements. Both of these overt acts involve situations where use of the mails was reasonably foreseeable.

In his response to the government's opposition, defendant Senterm presented an additional theory as to why Count One was invalid, as well as Counts Eight, Ten and Fifteen. Mr. Sentenn argues that the alleged fraudulent scheme was directed against the Louisiana Department of Insurance and since no property interest of the State of Louisiana was involved, the counts cannot properly charge

fraud. The short, and adequate, answer is that the indictment does not limit its charge to defrauding the Louisiana Department of Insurance. The indictment also alleges that the citizens of Louisiana, LIGA, and the claimants and policyholders of Pelican were defrauded by the defendants' scheme. Looking solely at the policyholders and claimants, it is obvious that their property interests were violated. Jurisdiction was therefore appropriate under the mail fraud statutes.

Ground Two: Ineffective Assistance of Counsel

Defendant Sentenn has four specific complaints regarding his attorney's representation. The first is that his counsel failed to ob~ject to and to move to exclude the testimony of four witnesses who were testifying pursuant to plea agreements. Mr. Sentenn contends these agreements violated Louisiana. Rule of Professional Conduct 3.4(b). Rule 3.4(b) prohibits an attorney from assisting a witness to testify "falsely" or offering an inducement to a witness "that is prohibited by law." While Mr. Senterin disputes the truthfulness of the witness' testimony, he has not shown that their testimony was false nor that the plea agreements entered into were "prohibited by law." While this Court stands by its belief that such agreements violate 18 U.S.C. § 201(c)(2)[4], the Fifth Circuit does not agree. United States v. Haese, 162 F.3d 359 (5th Cir. 1998), cert. denied, __U.S.__, 119 S.Ct.

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[4] See United States V. Fraguel , 1998 WL 560352 (E.D.La.), vacd on recon., 1998 WL 910219 (E.D. 1998) . Contrary to Mr. Sentenn's assertions, the Court did not discuss, much less rule upon, the applicability of Rule 3.4(b) to plea agreements.

1795 (] 999). United States v. Waternian, 732 F.2d 1527 (8th Cir. 1984), cert. denied, 471 U.S. 1065 (1985), also cited by Mr. Sentenn, dealt with a different situation - there the witness was promised a recommendation for reduction if his testimony resulted in further indictments. The plea agreements in this case were not contingent upon the outcome of the prosecutions.

The second basis of alleged ineffectiveness of counsel is counsel's failure to seek a mistrial when the prosecutor, in closing argument, referred to the failure of the "Biaette" memo to be admitted into evidence, referred to Mr. Sentenn as "the crooked lawyer with the crooked little stick", allegedly commented on Mr. Sentenn's failure to testify and during witness examination, elicited a prejudicial remark from Fred Rhoads. All of these complaints have been previously raised in post-trial motions and rejected. (Rec. Doc. 184). The Court still finds none of these alleged improprieties to be mistrial material. With respect to the Biaette memo, the Court again finds that the prosecutor's comments were fair reply to the repeated references by various witnesses and defense counsel to the memo's contents, even though the memo was inadmissible in evidence. (See for example, Trans. Vol. 9, pp. 1073-1076; Vol. 11, pp. 13051307; Vol. 14, p. 1988, pp. 2026-2027; discussions regarding admissibility of the memo appear at Trans. Vol. 11, pp. 1308-1313; Vol. 12, pp. 1674-1681; Vol. 13, pp. 1685-1687). The Court also notes that the CBD transaction, to which the Biaette memo refers, occurred in 1989. The memo was apparently written in 1990. (Trans. Vol. 12, p. 1676). Since the defendants were acquitted of all substantive charges prior to September, 199 1, it would appear the jury

believed the defendants' claim that they had disclosed the full nature of that transaction to the Insurance Department, despite their inability to get the memo into evidence. Hence, the prosecutor's remarks in closing regarding the memo created no prejudice. With regard to the "crooked lawyer" remark, the Court considers the comment unprofessional and even childish, but not prejudicial. During trial, the Court concluded, and still believes, that the prosecutor did not comment on Mr. Sentenn's failure to testify. (See Trans. Vol. 15, pp. 2222-2224). Finally, the Court's ruling with regard to Mr. Sentenn's dealings with Mississippi were directed towards prohibiting evidence of other misconduct. Mr. Rhoads' testimony did not indicate Mr. Sentenn's comments was in reference to wrongdoing outside of the allegations in the indictment. (Trans. Vol. 12, pp. 1598-1601). Furthermore, the comments were in fair reply to earlier testimony of the witness.

The next claim of ineffectiveness is for counsel's failure to preserve their objection to the Allen charge given by the Court after the jury indicated it was deadlocked. Thisissuewas previously also raised and re , jected in various post-trials motions. (Rec. Doc. 184). The Court did not consider the Allen charge to be unduly coercive so if counsel failed to preserve the alleged error, no prejudice ensued.

Mr. Sentenn's last complaint of ineffectiveness is counsel's alleged failure to urge at sentencing, that Mr. Sentenn, because of indigence, should not have to pay any restitution. In light of the amount of money lost through the actions of these defendants, Mr. Sentenn's effort to evade any financial responsibility is difficult to fathom. In any

event, while Mr. Sentenn may have lost his license to practice law, he had not lost the knowledge gained through his education and experience. The Court considered him at sentencing, and considers him now, to be capable of earning a living and paying restitution.

Accordingly,

IT IS ORDERED that the Motions for New Trial (Rec. Docs. 345 & 355) and Motion to Vacate Sentence (Rec. Doc. 343) filed by Michael Bowler and the Motion to Vacate Sentence (Rec. Doc. 341) filed by Walter Sentenn are DENIED.

IT IS FURTHER ORDERED that the Motion to Expand the Record (Rec. Doc. 359) filed by Michael Bowler is GRANTED and the Motion for Summary Judgment (Rec. Doc. 360) filed by Michael Bowler is DENIED.

New Orleans, Louisiana, this 23 day of November, 1999.

/s/ Helen G. Berrigan
HELEN G. BERRIGAN
UNITED STATES
DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed APR 11, 2000
UNITED STATES OF AMERICA CRIMINAL ACTION

VERSUS NO. 93-332

Walter Sentenn Jr. SECTION "C"

CIRTIFICATE OF APPEALABILITY

A notice of appeal fi-om a final order in a proceeding under Title 28 U.S.C. 2255 has been filed. Considering the record in the case and the requirement of Title 28 U.S.C. § 2253, the court hereby orders that:

❒ a certificate of appealability shall be issued having found that petitioner has made a substantial showing of the denial of a constitutional fight related to the following issue(s):

_____

_____

_____

❒ a certificate of appealability shall not be issued for the following reason(s);
The petitioner has failed to make a substantial showing of the denial of a constitutional right.

Date: 4/10/2000

/s/ Helen G. Berrigan
HELEN G. BERRIGAN
UNITED STATES
DISTRICT JUDGE

DATE OF ENTRY
APR 11 2000

APPENDIX C

N THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
Filed AUG 8 2000 D.C. Filed Aug 7, 2000 Ct. of Appeals

No. 00-30069
USDC Nos 99-CV-785-C
93-CR-332-2-C

UNITED STATES OF AMERICA, Plaintiff-Appellee,

versus

WALTER L. SENTENN, JR., Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana

Dae of Entry AUG 9 2000

0 R D E R:

Walter L. Sentenn, Jr., federal prisoner # 23808-034, requests this court to grant him a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion. In his application for a COA, Sentenn raises the following claims: (1) counsel was ineffective because he failed to challenge the district court's jurisdiction under the conspiracy and mail fraud statutes; (2) counsel was ineffective because he failed to object to and move for the

exchange for a reduced sentence; (3) counsel was ineffective because he failed to object to improper remarks made by the prosecutor during closing argument; (4) counsel was ineffective because he failed to object to the district court giving the jury a modified *Allen* charge; and (5) counsel was ineffective because he failed to object to the imposition of a restitution order.

Sentenn has failed to make a substantial showing of the denial of a constitutional right. See 28 U.S.C. § 2253(c)(2). Accordingly, his request for a COA is DENIED.

/s/ Edith H. Jones
EDITH H. JONES
UNITED STATES
CIRCUIT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-30099

Filed May 28 1997

UNITED STATES OF AMERICA,
Plaintiff - Appellee -Cross-Appellant,

versus

WALTER L. SENTENN, JR.; MICHAEL J. BOWLER,
Defendants - Appellants - Cross-Appellees.

Appeal from the United States District Court
For the Eastern District of Louisiana
(93-CR-332-C)

Before HIGGINBOTHAM, WIENER, and DENNIS, Circuit Judges.

PER CURIAM:*

The defendant did not object to the Allen charge. In the absence of objections and on the facts of this case we are not persuaded that the district court erred.

The remaining points of error are without merit.

AFFIRMED.

SEAL

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.